

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Eric Ciarolla,

Plaintiff

v.

Albertsons, LLC, and Center Pointe Plaza,
LLC,

Defendants

Case No. 2:23-cv-00313-CDS-EJY

Order Granting Plaintiff's Motion to
Remand and Closing Case

[ECF No. 9]

Plaintiff Eric Ciarolla moves to remand this slip-and-fall action to Nevada's Eighth Judicial District Court based on lack of diversity of citizenship between the parties of this action due to Center Pointe Plaza's presence as a defendant. ECF No. 9. Defendant Albertsons, LLC, the removing party, opposes remand claiming that defendant Center Pointe Plaza, LLC was improperly joined to defeat diversity jurisdiction. ECF No. 13. For the reasons herein, I find that removal was improper and remand this case.

I. Legal standard

"Federal courts are courts of limited jurisdiction, possessing 'only that power authorized by Constitution and statute.'" See U.S. Const. art. III, § 2, cl. 1; *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). When initiating a case, "[a] plaintiff is the master of [their] complaint, and has the choice of pleading claims for relief under state or federal law (or both)." *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1056 (9th Cir. 2018) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 389–99 (1987)). Generally, plaintiffs are entitled to deference in their choice of forum. *Ayco Farms, Inc. v. Ochoa*, 862 F.3d 945, 949–50 (9th Cir. 2017).

However, Congress has enacted statutes that permit parties to remove cases originally filed in state court to federal court. See 28 U.S.C. § 1441. Subject to certain requirements and

1 limitations, a defendant generally may remove a case from state court to federal court where the
2 case presents either diversity or federal question jurisdiction. 28 U.S.C. § 1441(a)–(c). Relevant
3 to this motion, diversity jurisdiction requires that (1) all plaintiffs be of different citizenship
4 than all defendants, and (2) the amount in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332(a).
5 The defendant bears the burden of establishing federal subject matter jurisdiction. *Ethridge v.*
6 *Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988). In order to protect the jurisdiction of state
7 courts, the removal statute should be construed narrowly, against removal jurisdiction and in
8 favor of remand. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941).

9 “[O]ne exception to the requirement of complete diversity is where a non-diverse
10 defendant has been ‘fraudulently joined.’” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th
11 Cir. 2001). “Fraudulent joinder” is a term of art: “Joinder of a non-diverse defendant is deemed
12 fraudulent, and the defendant’s presence in the lawsuit is ignored for purposes of determining
13 diversity, if the plaintiff fails to state a cause of action against a resident defendant, and the
14 failure is obvious according to the settled rules of the state.” *Id.* (internal quotation marks and
15 alterations omitted). There are two ways to establish fraudulent joinder: (1) actual fraud in the
16 pleading of jurisdictional facts; or, as alleged here, (2) inability of the plaintiff to establish a
17 cause of action against the non-diverse party in state court.” *Hunter v. Philip Morris USA*, 582 F.3d
18 1039, 1044 (9th Cir. 2009). Fraudulent joinder is established the second way if a defendant
19 shows that an “individual[] joined in the action cannot be liable on any theory.” *Ritchey v. Upjohn*
20 *Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). But “if there is a possibility that a state court would
21 find that the complaint states a cause of action against any of the resident defendants, the
22 federal court must find that the joinder was proper and remand the case to the state
23 court.” *Hunter*, 582 F.3d at 1046.

24 A defendant must prove fraudulent joinder by clear and convincing evidence. *Hamilton*
25 *Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

1 **II. Discussion**

2 This court cannot have diversity jurisdiction over this case if Center Pointe is a proper
3 defendant because both Ciarolla and Center Pointe are citizens of Nevada. ECF No. 9 at 5; ECF
4 No. 13 at 5. Albertsons argues that Ciarolla fraudulently joined Center Pointe to defeat diversity
5 jurisdiction and its presence should be ignored for purposes of analyzing diversity. ECF No. 13 at
6 4–8. Thus, the crux of this decision is whether Center Pointe is a proper party to this action or
7 fraudulently joined. Albertsons claims that Center Point was fraudulently joined because of
8 Ciarolla’s inability to establish a cause of action against it in state court. ECF No. 11 at 5.

9 **A. Ciarolla states a viable cause of action against Center Pointe.**

10 Ciarolla argues that Center Pointe is a proper party because he has a valid negligence
11 claim against Center Point for breaching its duty as a property owner to keep its premises safe.
12 ECF No. 9 at 8. I agree.

13 In March 2021, Ciarolla allegedly slipped and fell while shopping at Albertsons. Compl.,
14 ECF 1-1 at ¶¶ 7–8. Ciarolla claims that he “fell and injured himself as a result of food on the floor
15 and/or hazardous flooring.” *Id.* at ¶ 8. Ciarolla sued both Albertsons and Center Pointe, bringing
16 one cause of action for negligence. *Id.* at ¶¶ 10–21.

17 As a property owner, Center Pointe is not liable for an injury on their property absent
18 negligence. *See Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 849 P.2d 320, 322 (1993) (citing *Gunlock v.*
19 *New Frontier Hotel Corp.*, 78 Nev. 182, 370 P.2d 682, 684 (1962)). In Nevada, negligence is shown by
20 establishing the property owner (1) owed the plaintiff a duty of care, (2) breached that duty, (3)
21 the breach was the legal cause of the plaintiff’s injuries, and (4) the plaintiff suffered damages.
22 *See Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 221 P.3d 1276, 1280 (2009).

23 Albertsons argues that there is there is “no reasonable possibility” that Ciarolla can
24 prevail against Center Pointe. ECF No. 13 at 5. It first argues that pursuant to defendants’ lease
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26

1 agreement,¹ Albertsons is “entirely responsible for maintaining the inside of the store” and thus
 2 Center Pointe has no obligation to do so or duty. *Id.* at 6. In the alternative, Albertsons argues
 3 that irrespective of the lease agreement, Center Pointe has no obligation, duty, or ability to clean
 4 the inside of Albertsons because its obligations are limited to the common areas of the shopping
 5 center, not the inside of the store. ECF No. 13 at 6–7. Albertsons further argues that Ciarolla’s
 6 allegations against defendants are limited to failure to maintain, inspect use, warn, secure, and
 7 creating a dangerous condition, none of which implicate Center Pointe as a landlord. *Id.* at 7.

8 However, Albertsons fails to address Ciarolla’s hazardous flooring claim. And as Ciarolla
 9 states, “nothing in the lease indicates who installed the flooring at issue” (ECF No. 15 at 4), and
 10 the complaint leaves open the possibility that Ciarolla’s fall was the result of a flooring defect.
 11 “[W]here there are colorable claims or defenses asserted against or by diverse and non-diverse
 12 defendants alike, the court may not find that the non-diverse parties were fraudulently joined
 13 based on its view of the merits of those claims or defenses.” *Rundle v. Depuy Orthopaedics, Inc.*, 2011
 14 U.S. Dist. LEXIS 80514, 22 (D. Nev. July 6, 2011) (quoting *Batoff v. State Farm Ins. Co.*, 977 F.2d 848,
 15 851–52 (3rd Cir. 1992)). “Any possibility of recovery, even if slim, militates against a finding of
 16 fraudulent joinder; only where there is ‘no possibility’ of recovery is such a finding warranted.”
 17 *Ehrenreich v. Black*, 994 F. Supp. 2d 284, 289 (E.D.N.Y. 2014) (quoting *Nemazee v. Premier, Inc.*, 232 F.
 18 Supp. 2d 172, 178 (S.D.N.Y. 2002)).

19 While Ciarolla may ultimately not prevail against Center Pointe in state court, the court
 20 cannot say that Albertsons has established by clear and convincing evidence that there is no
 21 possibility that Ciarolla will not prevail against Center Pointe regarding his hazardous flooring
 22 claim. *See Milligan v. Wal-Mart Stores, Inc.*, 2014 U.S. Dist. LEXIS 175728, 2014 WL 7240162, at *3 (D.
 23 Nev. Dec. 18, 2014) (“In assessing whether a defendant was fraudulently joined, the court need
 24 not look extensively at the merits of the claims.”). As such, Albertsons has not met its burden to

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 26 ¹ In relevant part, the lease agreement states that Albertsons, as the tenant, is responsible for maintaining
 and repairing the premises in good operating condition. Lease Agreement, Def.’s Ex. C, ECF No. 13-3 at ¶
 14.2

1 show that Center Pointe was fraudulently joined. *See Nemazee*, 232 F. Supp. 2d at 178 (citation
2 omitted) (“Any possibility of recovery, even if slim, militates against a finding of fraudulent
3 joinder; only where there is ‘no possibility’ of recovery is such a finding warranted.”)

4 Therefore, I find Center Pointe was not fraudulently joined, that there is not complete
5 diversity between the parties, so I lack jurisdiction over this action. For those reasons, I grant
6 Ciarolla’s motion to remand.

7 III. Attorneys’ Fees

8 Ciarolla requests attorneys’ fees under 28 U.S.C.A. § 1447(c). ECF No. 9 at 9. “Absent
9 unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the
10 removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an
11 objectively reasonable basis exists, fees should be denied.” *Martin v. Franklin Cap. Corp.*, 546 U.S.
12 132, 141 (2005). Albertsons opposes attorneys’ fees and claims it had a reasonable basis for
13 removal. ECF No. 13 at 9. Ciarolla’s motion failed to discuss the reasonableness of Albertsons’
14 arguments, only stating that Albertsons failed to address the hazardous flooring allegations.
15 ECF No. 15 at 6.

16 Here, while Albertsons failed to meet its burden to show fraudulent joinder, the court
17 does not find that removal was objectively unreasonable. The court’s decision to remand was
18 based in Albertsons’ heavy burden to demonstrate fraudulent joinder at this stage rather than a
19 reflection on the reasonableness of Albertsons’ decision to seek removal. Accordingly, the court
20 denies Ciarolla’s request for attorneys’ fees.

21 IV. Conclusion

22 IT IS THEREFORE ORDERED that plaintiff’s motion to remand [ECF No. 9] is
23 GRANTED. The Clerk of Court is kindly directed to remand this case to the Eighth Judicial
24 District Court, Case No. A-22-859398-C, Department 19, and to close this case.

25 DATED: December 12, 2023

26 
Cristina D. Silva
United States District Judge